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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GERALD T. FREY
Superintendent, Missouri Eastern Correctional Facility,
Petitioner,

v.

VICTOR PAUL ANDERSON
Respondent.

ON PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighth Circuit utilized the wrong standard of review in concluding that respondent was not accorded due process due to the manner used to the method used to select bystander jurors in New Madrid County, Missouri.

2. Whether the Eighth Circuit's conclusion that §494.250.2, RSMo is, *de facto,* unconstitutional is correct in that this conclusion has no precedential support.

3. What safeguards does the United States Constitution require when trial courts discover that talesmen or bystander are required to complete the venire?

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OPINIONS BELOW

The Order of the United States District Court for the Eastern District of Missouri, denying respondent's petition for a writ of habeas corpus, is unreported and appears as Appendix B of the present petition. The Magistrate's report and recommendations upon which the District Court's order was founded are attached as Appendix C of this petition. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reversing the decision of the District Court and granting respondent's petition for a writ of habeas corpus is appended hereto as Appendix A.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, granting respondent's petition for a writ of habeas corpus under 28 U.S.C. §2254, was filed on August 31, 1983. Pursuant to 28 U.S.C. Section 2101(c), the present petition for a writ of certiorari was required to be filed within ninety (90) days of the entry of this judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fourteenth Amendment to the United States Constitution, in pertinent part, provides as follows:

> "All persons born or naturalized to the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 494.250.2, RSMo 1978, reads as follows:

> "In all cases where the Board of Jury Commissioners fails to select jurors and alternates, as required by law, the sheriff of the county shall summon petit jurors from the several townships in the county, according to their respective populations, and as nearly as may be, not less than ten days before the first day of the term of court for which the jurors are summoned; and the sheriff when ordered by the court demanding a jury shall summon petit jurors during the term from the by-

standers, after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record."

STATEMENT OF FACTS

Respondent Anderson was charged by information on August 18, 1980, with attempted robbery in the first degree in New Madrid County on or about May 26, 1980. Appellant was tried by a jury in the Circuit Court of New Madrid County on October 29, 1980, and on that same date, the jury returned a verdict of guilty of attempted burglary in the first degree. Appellant was sentenced to ten years imprisonment. The evidence adduced at trial was as follows.

On May 26, 1980, respondent, Henry Holloman and Tom Moore met in Howardville, Missouri, and agreed to rob Mattie's Package Store in nearby Catron (Tr. 36, 48, 51). Three men got into Mr. Moore's automobile, and he drove them to the store in Catron (Tr. 36, 48). There, respondent and Mr. Holloman got out of the car and went into the store (Tr. 36, 49).

Once inside, Mr. Holloman asked the proprietor, Mattie Thompson, for one-half pint of Canadian Mist whiskey (Tr. 28, 36). Ms. Thompson asked them for some type of identification (Tr. 28). At this time, respondent pulled a ski cap down over his head and drew a gun (Tr. 28, 36). Ms. Thompson began to scream, and respondent and Mr. Holloman turned around and ran out the door (Tr. 28, 36-37). They both got back into the car, and Mr. Moore drove them away (Tr. 29, 37, 49). Ms. Thompson was unable to identify either man who came into her store, but both were about the same size and age as respondent (Tr. 29-30).

All three men were eventually arrested and confined in the New Madrid County Jail (Tr. 49, 62-63). While confined in jail, appellant gave a letter to his friend, Linda Owens, with instructions that she deliver it to Mr. Holloman (Tr. 57). That letter stated as follows:

"Say Blood.

"I would just like for you to know that you didn't have to put the (X) in my back. But so you did. I just wish you would have gotten some money for it. Because it was not worth what you got. And that was lie to you. See they said that you wouldn't be too far behind me. And that Tom was going to be the only one that didn't get any time.

"And I'll see you when you get there. don't [sic] worry I'll look out for you when you do get there.

"I don't hate you. I just don't understand. You can run but you can't'— There's a mark with an 'H/ So enjoy yourself because you will be here and there soon.

"Victor Paul Anderson
"the man you (+)
"hope to see you
"when ever" (Tr. 60).

Ms. Owens did deliver that letter and returned to appellant a letter from Mr. Holloman (Tr. 58), which stated as follows:

"Hellow Blood

"Sitting here with your letter in had [sic]. I am going to do my best to let you know what went down. It [sic] like this. Tom did it. Our lawyer said that the man wanted you and said that I had a chance to keep myself out by putting it on you because Tom was already going to do that. Tom [sic] mother made some

kind of deal with Ivy to get him out. He did not have a bondsman. Ivy got him out. I feel that had a good chance to win. But when our lawyer call [sic] us out and said that Tom statement and what Tom was going to say I was finish [sic]. I don't blame you for thinking the way you do. But I felt I can do you more good out here. Man[,] I made you a promise about your child and I am going to do my best. On your letter it seem that you forgot that I am a man to [sic]. Man[,] everyday Robert came to the job to see if I am there and by the house every night. Tom was and Memphis friday [sic] when robert [sic] came out to the job and all he said was that it ok and look at me [sic]. You mae [sic] be right about me [sic] not being far behind you. But its to beat to cahnce now [sic]. So I have to go through with it. Getting up on that stand and saying that shit was the hard [sic] thing I doin' in my life in I have to do it again [sic]. I hope this letter has help [sic] you to understand what is going on. And I am not trying to put the cross on Tom that is how things went [sic].

"P.S. If you need something[,] tell
Linda to tell me
and you got it.
And I am not trying to buy something. We already
got friendship"
(Tr. 60-61)

At trial, twenty-six veniremen had been summoned from the list drawn up by the Board of Jury Commissioners (Tr. 21). Of those, four were absent and four were struck for cause. Thus, of the twenty-eight veniremen left on the panel before challenges, eighteen had been summoned by the Board of Jury Commissioners. The ten remaining ve-

niremen were summoned by the sheriff under two special venires. Respondent challenged, for cause, all the members of the jury panel who had been summoned by the sheriff (Tr. 19-20). This challenge was denied (Tr. 20). Respondent then moved to quash the jury panel on the ground that an insufficient number of veniremen had been summoned by the Board of Jury Commissioners (Tr. 20-21). This Motion to Quash was denied (Tr. 25).

Respondent then filed a notice of appeal to the Supreme Court of Missouri on September 11, 1980. On appeal, respondent's sole contention was that the state trial court had erred in failing to quash the jury panel because respondent had thereby been deprived of his right to a petit jury selected from a fair cross-section of his community. On September 8, 1981, the Supreme Court of Missouri affirmed respondent's conviction, *State* v. *Anderson*, 620 S.W.2d 378 (Mo. 1981).

Respondent then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri, on September 24, 1981. Respondent raised the jury-selection issue, along with several other issues. Petitioner's response was that he had failed to exhaust state remedies on the other grounds and that the sole exhausted ground provided no basis for relief.

On December 8, 1981, United States Magistrate David D. Noce recommended that respondent be given an evidentiary hearing on the jury-selection issue and that respondent's remaining grounds be dismissed for failure to exhaust state remedies. The district court accepted the magistrate's Report and Recommendation, and an evidentiary hearing was held on April 21, 1982. At the conclusion of this hearing, both parties were given leave to file briefs. On August 9, 1982, Magistrate Noce filed his Report and Recommendation, by which he recommended that Re-

spondent's Petition for Writ of Habeas Corpus be denied (Exhibit C). The district court entered its order adopting the Report and Recommendation of the magistrate and denied the petition for habeas corpus on September 3, 1982 (Exhibit B).

The district court issued a certificate of probable cause for appeal, and respondent appealed the district court decision to the United States Court of Appeals for the Eighth Circuit. That court reversed the decision of the district court in *Anderson* v. *Frey*, No. 82-2208-EM, decided August 31, 1983 (Appendix A). To avoid duplication, the details of the Eighth Circuit's holding will be discussed in the argument, *infra*.

Jurisdiction of the United States District Court

The basis for the district court's jurisdiction in this cause was 28 U.S.C. Section 2254.

ARGUMENT

I. BACKGROUND

It is well known that when a venire is not complete, the trial judge may direct that the venire be completed by the summoning if "talesmen" or "bystanders." This is a practice that existed at common law. *State* v. *McCambry*, 225 Kan. 803, 594 P.2d 222 (1979); *Bruce* v. *State*, 169 Miss. 335, 152 So. 490 (1934).

The early practice was to direct the sheriff to summon the additional jurors, *id*, and this duty was codified early in the history of this country. *See Clawson* v. *United States*, 114 U.S. 477, 5 S.Ct. 949, 29 L.Ed. 179 (1885), citing §804 of the Revised Statutes; §15, RSMo 1845. Indeed, the practice of ordering the sheriff to summon talesmen was the practice in the federal system until 1968. Title 28 U.S.C. §1866(a) (repealed) read:

> "Whenever sufficient petit jurors are not available, the court may require the United States Marshal to summon a sufficient number of talesmen from the bystanders."

Petitioner has found no cases holding that this statute was either constitutional or unconstitutional, but generally, the selection of talesmen under the federal statute and its predecessors was upheld, *St. Clair* v. *United States*, 154 U.S. 134, 14 S.Ct. 1002, 38 L.Ed. 936 (1894); *Lovejoy* v. *United States*, 128 U.S. 171, 9 S.Ct. 57, 32 L.Ed 389 (1888); *United States* v. *Meyer*, 113 F.2d 387 (7th Cir. 1940); *Cravens* v. *United States*, 62 F.2d 261 (8th Cir. 1932), as were occasional challenges to similar state statutes, *Humes* v. *Robbins*, 128 F. Supp. 586 (D.Me. 1955). However, in cases where the United States Marshal did not follow the statute, the case would be reversed. *Ippolito* v. *United States*, 108

F.2d 668 (6th Cir. 1940) (United States Marshal called his relatives to fill the venire).

State statutes regarding the summoning of talesmen were substantially similar to the former federal practice and were also generally upheld against challenge, either for failure to comply with the statute, *Losieau* v. *State*, 157 Neb. 115, 58 N.W.2d 824 (1953); *People* v. *Siciliano*, 4 Ill. 2d 581, 123 N.E.2d 725 (1955); *Taylor* v. *State*, 420 S.W.2d 601 (Tex. 1967); *State* v. *Olek*, 179 N.W.2d 320 (Minn. 1970), or on due process grounds, *State* v. *McCambry*, *supra*; *State* v. *Cody*, 323 N.W.2d 863 (S.D. 1982).

Respondent would note that while although there is some movement away from the traditional method of summoning talesmen (see 18 U.S.C. §1866), the traditional method is still in place in several jurisdictions, Cal. Code C.P. §227, Ill. Rev. Stat. §78-12, Kan. Stat. §43-167, N.J. Rev. Stat. 2A: 74-10, and Ohio Rev. Code Ann. 2313.38.

II. PRIOR CASES IN THIS AREA

In *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980), *cert. denied*, 450 U.S. 958, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1981), the Court of Appeals held that when a sheriff whose department investigated the crime also selected only his acquaintances as the talesmen, there was a rebuttable resumption of prejudice. The court noted a series of state cases and one federal case that required a showing of prejudice, 634 F.2d at 1083-1084, but chose to ignore those cases and, instead, relied upon the authority of *Peters* v. *Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), in order to create this presumption. The Court of Appeals did not mention that the opinion quoted from did not command a majority of this court[1] In sum, *Henson* established an ir-

[1]The Court of Appeals mentioned other cases that have used "the probability of prejudice" to vacate convictions. These will be discussed *infra*.

rebuttable presumption of prejudice that does not require any affirmative evidence of prejudice by a defendant or that would allow evidence of no prejudice to be produced by the state.

In *Holt* v. *Wyrick*, 649 F.2d 543 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143, 102 S.Ct. 1002 (1982), the prisoner failed in his challenge because he had established neither of the factors set out in *Henson*. The Court of Appeals considered these two factors to be "equally important." 649 F.2d at 546. The next case considering this issue was *Thompson* v. *White*, 661 F.2d 103 (8th Cir. 1981), *vacated and remanded*, 456 U.S. 951, 102 S.Ct. 2003 (1982), *on remand*, 680 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 830 (1983). *Thompson* was reversed based on the authority of *Henson*. The reasons given were that the sheriff might be biased in selecting the jurors and that the sheriff had selected the entire panel, 661 F.2d at 107.

In the instant case, the sheriff was the supervisor of the deputy sheriff who investigated the crime. The bystander jurors were obtained by five deputies and one city marshal. The investigating deputy was not one of these five and was not called as a witness by the state at trial, although he was called by the defendant. The Court of Appeals vacated the conviction, although the case was "a close one on the facts" (Appendix A).

The Court of Appeals held that the central concern in *Henson* is the unfairness that arises when an interested official selects the bystander jurors. The court also strengthened a presumption first suggested in *Henson*, which is that a law enforcement official, while selecting these bystander jurors, will not act properly, but will tend to select pro-conviction veniremen. In fact, despite the express holding in *Holt* that there is no fundamental unfairness when a law enforcement official who was uninvolved in the investi-

gation selects the talesmen, the court held that the uninvolved city marshal was sufficiently interested. Indeed, the result of this unwarranted extension of *Henson* is that the Missouri statute regarding the selection of bystander jurors is *de facto* unconstitutional.

ANALYSIS

A.

Respondent submits that the irrebuttable presumption of error standard adopted by the Eighth Circuit is flawed, along with that court's irrebuttable resumption of prejudice. The Court of Appeals has erred in adopting these standards of review because there is no authority for these tests in the decisions of this Court, and they stand in contravention to analogous cases, such as *Casteneda* v. *Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Duren* v. *Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); and *United States* v. *Kelton*, 518 F.2d 531 (8th Cir. 1975), *cert. denied*, 423 U.S. 1021, 96 S.Ct. 460, 46 L.Ed.2d 394 (1976). The preceding cases have yielded a test under which the state may respond with positive evidence should the challenging party make a *prima facie* case and require a showing of affirmative prejudice. The Court of Appeals has also failed to consider the practical safeguards available to a defendant concerned about jury prejudice under Missouri law, including unrestricted voir dire of potential jurors and free change of venue in countries where the population is under 75,000. The end result is that the Eighth Circuit has declared §494.250.2, RSMo 1978, to be *de facto* unconstitutional.

Respondent will first argue that the Court of Appeals erred in establishing an irrebuttable presumption of constitutional error, a standard first enunciated in *Henson* v. *Wyrick*, *supra*, and applied in the instant case. Respondent believes that the Eighth Circuit has, in developing the

Henson standard, ignored cases analogous to this case and similar cases. The Court of Appeals has also dispensed with, by omission, the presumption that a public official will perform his duties in compliance with the law.

This Court has, in past years, considered several cases where either grand or petit juries were challenged under theories where groups were being omitted from service. In none of those cases did the court utilize a irrebuttable presumption of constitutional error; rather, if the party challenging the system could make a *prima facie* case regarding the exclusion of a group, then the state would be afforded an opportunity to offer positive evidence that the omissions were justified or occurred as the result of a nonbiased selection process. *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); *Taylor* v. *Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Casteneda* v. *Partida, supra; Duren* v. *Missouri, supra.*

The Eighth Circuit standard in *Henson* and in the case at bar held that if the challenging party could make a *prima facie* case, constitutional error was presumed, with the effect that the State of Missouri could not, despite *Swain* and *Taylor*, etc., offer evidence that the method used to select bystanders was justifiable. Thus, petitioner submits that the Court of Appeals has erred in the basic determination of whether constitutional error exists in a given case.

Even more egregious is the Court of Appeals' presumption of prejudice. In *Henson*, the Court held:

> "When the potential prejudice is as great as it was here a showing of actual prejudice to the defendant is not necessary in order to warrant a new trial." 634 F.2d at 1085.

The court cited it in a footnote to *Peters* v. *Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), as support for this

holding. The opinion and footnote do not mention that the material quoted from *Peters* commanded only three members of this Court. Also briefly discussed was *Taylor* v. *Louisiana*, 419 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), where the Court vacated a conviction based on the possibility that the bailiff witness had impermissible contact with jurors. *Taylor is* easily distinguished from both *Henson* and the case at bar, as will be demonstrated below.

The chief distinguishing factor between this case and *Taylor* is the array of procedural protections that a party is accorded under Missouri law to ensure an impartial jury. First, a party who suspects prejudice has a full and virtually unfettered opportunity to voir dire the potential jurors. Voir dire in Missouri is still conducted by the attorneys, and the defendant has the opportunity to ferret out any biases that may exist. See 29 Mo. Law Review 259, 305 (1964); 34 J.Mo.Bar. 111 (1978). In fact, the questions that would be asked by a defendant in this situation are the same questions that would normally be asked on voir dire: Does the venireman know the sheriff or any of the witnesses? Is the venireman disposed to convict? Can the venireman consider the evidence, forgetting any prior notions or opinions? The entire purpose behind voir dire is to expose any bias or prejudice in order to guarantee the right to a fair trial by impartial jurors, and if a juror can lay aside his prejudices or opinions and render a verdict based on only the evidence, the Constitution is satisfied. *Dobbert* v. *Flordia*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), *rehearing denied*, 434 U.S. 882, 98 S.Ct. 246, 54 L.Ed.2d 166 (1977).

The opinion of the Court of Appeals in *Henson* stated that the voir dire procedure would not be effective in discovering prejudice in these cases. 634 F.2d at 1085. Not only is this statement unsupported, but should be rejected as an attack upon the entire system in which we select juries in

the United States. Petitioner would remind this Court that respondent received a full opportunity to voir dire this jury panel; respondent has not identified any juror who, arguably, should have been removed for cause due to bias. Respondent's opportunity to identify and locate bias or prejudice was greater than he would have been afforded in the federal courts, and petitioner argues rejection of the Court of Appeals' premise that voir dire is ineffective to discover prejudice in potential jurors.

Further, a defendant has other safeguards should he become concerned about the possibility of prejudice. Missouri law allows a defendant an automatic change of venue, on request, from any county with a population of 75,000 or fewer inhabitants, Rule 32.03, or on a showing of prejudice, Rule 32.04. A change of judge is also automatic, Rule 32.06. In sum, there is a panoply of means by which a defendant can avoid or identify prejudice in a jury panel. These means were unavailable to prevent the prejudice in *Taylor*, and therefore these cases are distinguishable. Had the Eighth Circuit been able to isolate any instance of prejudice from the record, petitioner would have no ground for this petition; however, being unable to identify any actual prejudice in the record, the Court of Appeals was forced, again, to adopt the irrebuttable presumption of prejudice as enunciated in *Henson*.

In creating this irrebuttable presumption in *Henson* and in continuing to apply it in this case,[2] the Court of Appeals has demonstrated the existence of a double standard. In *United States* v. *Kelton*, *supra*, the Eighth Circuit reiterated their rejection of the "per se theory of implied bias," in favor of a requirement that actual prejudice be

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[2]The lack of basis for the Eighth Circuit's presumption is made clear by the court's own admission that neither the sheriff nor his deputies engaged in any illegal conduct.

demonstrated. 518 F.2d at 533. *Kelton* was a challenge to a conviction under 28 U.S.C. §2255, the post-conviction relief statute for federal convictions. Yet, when considering a challenge to a state conviction under 28 U.S.C. §2254, the Eighth Circuit has adopted a theory of implied prejudice (the irrebuttable presumption of prejudice) that it declines to use in reviewing federal convictions. It goes without saying that such a double standard is in direct opposition to the principle of state and federal comity. Petitioner is aware of no case or statute that permits a federal court to employ one standard in review of a federal conviction, while exercising a more stringent standard in review of a state conviction. In all the errors of omission and commission made by the Eighth Circuit in dealing with the Missouri talesmen cases, the establishment of this double standard is most striking.

The establishment of the irrebuttable presumption of prejudice by the court also ignores a fundamental principle of judicial analysis—that a public official will perform his duties in accordance with the law, and the burden to prove otherwise by irrefragable proof is on the complainant. *Starr* v. *Federal Aviation Administration,* 589 F.2d 307 (7th Cir. 1978); *Parsons* v. *United States,* 670 F.2d 164 (Ct.Cl. 1982). There has been no suggestion in the case at bar that the sheriff or his deputies did anything but perform their duties in accordance with the law, both statutory and constitutional. Indeed, the Court of Appeals concedes as much. The failure by the Court of Appeals to consider this presumption, in what respondent believes is a necessary determination of prejudice in the selection of talesmen, is yet another error in the Eighth Circuit's analysis of the Missouri talesmen cases.

The result of this line of cases, extending from *Henson,* to the instant case is to declare the Missouri statute to be, *de facto,* unconstitutional. Is doing so, the Court of

Appeals has avoided a fundamental principle of constitutional law--that a state statute is presumptively constitutional. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harvard Law Review 129 (1893); *Flemming* v. *Nestar*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), *rehearing denied*, 364 U.S. 854, 81 S.Ct. 29, 5 L.Ed.2d 77 (1961). *Williams* v. *General Foods Corporation*, 492 F.2d 399 (7th Cir. 1974). The Court of Appeals should have openly stated that they believe the Missouri statute unconstitutional (and, by extension, the statutes of the several states with similar provisions) or specified in what instances the statute might be constitutionally applied. Although this is not in itself sufficient reason to grant certiorari, this does point out the flawed manner in which the Eighth Circuit has con-sidered this line of cases.

Although this statute is capable of misuse, as was the former federal statute, see *Ippolito* v. *United States, supra*, the Eighth Circuit's blanket presumption of prejudice has rendered the Missouri statute virtually unusable. For reasons mentioned below, even repeal of §494.250, RSMo 1978, and replacement by the state with the presumably valid federal scheme, 28 U.S.C. §1866, would not prevent great harm to Missouri jurisprudence or to the interests of a majority of the states. This *de facto* declaration of unconstitutionality is unnecessary and could be avoided if the challenging party had to come forth with evidence that there was actual prejudice caused by the allegedly unconstitutional practice. Then, only those persons truly wronged by the method of selection would be given relief, while those persons unable to isolate or identify any prejudice would not receive relief that is unwarranted and undeserved. The double standard created by the Eighth Circuit is not only hostile to the notion of state-federal comity but has led to the ultimate conclusion that the Missouri method for se-

lection of talesmen—the system of several other states and the former system utilized by both the federal system and numerous state courts—is, *de facto,* unconstitutional.

B.

The final item to be addressed is the effect of the Missouri talesmen cases on petitioner and other jurisdictions. If the irrebuttable presumption relied upon by the Court of Appeals (which would include that court's double standard of review) is allowed to stand, then an untold number of convictions believed valid until recent date will be challenged not only in Missouri, but, conceivably, in any jurisdiction that is incarcerating persons convicted by a jury containing talesmen selected under the common-law method, including the federal system. As the prisoner would not have to demonstrate any prejudice to receive relief, the vast majority of prisoners would be entitled to federal habeas corpus relief, and due to the passage of time, many of these persons could not be retried.

Secondly, petitioner argues that should Missouri adopt the method of selection of talesmen advocated by the Eighth Circuit and codified in federal statute, that adoption would serve to make little difference in practical terms. Each of the Missouri talesmen cases have come from rural counties. Obviously, summoning jurors is much more difficult in a rural county than in an urban area, because there is a smaller pool of potential veniremen. It is likely that many of the supposedly "pro-conviction" jurors who know or are known by the local sheriff will be called, regardless of the method of selection (assuming that the state had been selecting "pro-conviction" jurors). Although the federal system may theoretically reduce the possibility of constitutional abuse, the State of Missouri ought to be allowed to use a system derived at common law, utilized for scores of years in this nation, and accepted until recently as an approved method of supplementing venires.

CONCLUSION

In view of the foregoing, the petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Victor Paul Anderson,
Appellant,

v.

Gerard Frey, Superintendent of Missouri Eastern Correctional Center,
Appellee.

No. 82-2208

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: February 17, 1983

Filed: August 31, 1983

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

McMILLIAN, Circuit Judge.

Victor Paul Anderson appeals from a final judgment entered in the District Court for the Eastern District of Missouri denying his petition for writ of habeas corpus. For reversal appellant argues the district court erred in finding that the method of selecting supplemental prospective jurors or "bystander" jurors used in his trial did not violate due process. For the reasons discussed below, we reverse the judgment of the district court and remand with directions.

Procedural History

Appellant was found guilty by a jury of attempted armed robbery in the Circuit Court for New Madrid County, Missouri, in October 1980. Appellant was sentenced to ten years imprisonment. Appellant appealed his conviction to the Missouri Supreme Court alleging that the county sheriff unconstitutionally participated in the selection of the jury panel pursuant to Mo. Rev. Stat. §494.250(2) (1978).[1] The Missouri Supreme Court rejected this constitutional attack and affirmed his conviction. *State* v. *Anderson*, 620 S.W.2d 378 (Mo. 1981).

In September 1981 appellant filed this petition for writ of habeas corpus raising four grounds for relief: (1) the state improperly called a witness who was not listed as a prosecution witness, (2) the jury was unconstitutionally selected, (3) appellant was unlawfully arrested and did not receive a full and fair hearing, and (4) two state witnesses committed perjury at the trial. The district court referred the petition to a magistrate pursuant to 28 U.S.C. §636(b). The magistrate found that appellant had failed to exhaust available state remedies with respect to every ground except the jury selection ground[2] and recommended an evi-

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[1]Pursuant to Mo. Rev. Stat. § 494.250(1) (1978), the Clerk of the Board of Jury Commissioners prepares a list of prospective jurors by selecting names at random from voter registration lists. If, after the list of prospective jurors is exhausted by absences or excuses for cause, the number of remaining prospective jurors is less than 24, the sheriff on order of the court "shall summon petit jurors during the term from the bystanders." *Id.* §494.250(2); *see State* v. *Alexander*, 620 S.W.2d 380, 384 (Mo. 1981) (banc).

[2]Appellant may raise the other grounds for relief in state post-conviction relief proceedings. Appellant exhausted available state remedies with respect to the jury selection ground by raising that issue before the Missouri Supreme Court. All that we require is that a state be given one full and fair opportunity to decide a question. *E.g.*, *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975).

dentiary hearing on that ground in light of *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980) (filed Nov. 12, 1980), *cert. denied*, 450 U.S. 958 (1981), a case decided after the trial in the present case in which this court disapproved of the same method of bystander juror selection. *Anderson* v. *Frey*, No. 81-1187-C(2) (E.D. Mo. Dec. 8, 1981).

Following the Supreme Court's disapproval of mixed petitions for writ of habeas corpus in *Rose* v. *Lundy*, 455 U.S. 509 (1982), appellant elected to waive his three unexhausted grounds and to proceed on the jury selection ground only. Following an evidentiary hearing, the magistrate found that the method used to select bystander jurors in the present case did not violate due process and distinguished the present case from *Henson* on three grounds: the sheriff did not personally select any of the bystander jurors but delegated that responsibility to deputy sheriffs and city marshals, the sheriff placed some limitations on the exercise of discretion by the deputy sheriffs and no sheriff's department personnel testified on behalf of the prosecution. *Anderson* v. *Frey*, No. 81-1187-C(2) (E.D. Mo. Aug. 9, 1982). The district court accepted the report and recommendation of the magistrate and denied the petition for writ of habeas corpus. This appeal followed.

Background Facts

Appellant's trial was held in October 1980 in New Madrid County, Missouri. New Madrid County is a rural and relatively sparsely populated county in southeast Missouri. In 1980 the county sheriff's department consisted of a sheriff, four full-time deputies and several city marshals who served as part-time deputies. The sheriff is an elected official. The sheriff's department's duties include law enforcement, criminal investigation, subpoenaing prospective jurors and witnesses, and delivering civil summonses. The sheriff also serves as the bailiff during criminal trials and is in charge of or supervises the selection of bystander

jurors upon order of the county circuit court pursuant to Mo. Rev. Stat. §494.250(2). At the evidentiary hearing the sheriff testified that in 1980 in order to select bystander jurors he would contact the deputy sheriffs and city marshals by radio and direct them to select a certain number of persons for jury service. The sheriff would give the deputy sheriffs and city marshals general guidelines (i.e., sex and race) in order to produce a mixed panel of bystander jurors representative of the county. The deputy sheriffs and city marshals testified that they selected bystander jurors within these general guidelines. They tried to select "upstanding citizens" who were county residents and "available" for jury service on the basis of their personal knowledge of the particular individual. The sheriff testified that he would veto a particular bystander juror if the individual was a close friend or for some other good reason unqualified.

Of the twenty-six prospective jurors summoned by the Clerk of the New Madrid County Board of Jury Commissioners for appellant's trial, four were absent and four were removed for cause. The state trial court directed the sheriff to summon a total of thirteen bystander jurors to complete the jury panel. The sheriff contacted five deputy sheriffs and one city marshal, who was not an employee of the sheriff's department, and asked them to find the necessary bystander jurors. The selections were made on short notice; the supplemental venire orders were issued on October 27 and 28 and the trial was scheduled to begin October 29. The sheriff was slightly acquainted with all thirteen bystander jurors but did not know any of them well. On the first day of trial one of the bystander jurors was removed for cause and two were absent. Appellant challenged the ten bystander jurors for cause and then moved to quash the jury panel on the grounds that the jury commissioners had improperly failed to summon a sufficient number of

prospective jurors and the necessary bystander jurors had been selected by the sheriff. The state trial court denied both motions. Three of the bystander jurors served on appellant's jury.

The New Madrid County sheriff's department conducted the investigation of the attempted armed robbery for which appellant was convicted. The sheriff testified that he did not personally conduct the investigation but that he was the supervisor of the deputy sheriff who was primarily responsible for the investigation. The investigating deputy sheriff was not involved in the selection of the bystander jurors. The sheriff served as the bailiff during appellant's trial but did not testify at the trial. The investigating deputy sheriff was called as a witness by the defense[3] and testified about his investigation and about written and oral statements made by one of the persons involved in the attempted armed robbery which tended to incriminate appellant.

Discussion

The issue in the present case is whether the sheriff's involvement in the selection of bystander jurors deprived appellant of due process.

This court has been concerned with the opportunity for abuse presented when the sheriff or another "key man" exercises discretion in selecting bystander jurors to complete jury panels. *See Ross* v. *Wyrick*, 581 F.2d 172, 174-75 (8th Cir. 1978) (unconstitutional underrepresentation of blacks on master jury list was not cured by sheriff's personal selection of blacks as bystander jurors); *cf. Cravens* v. *United States*, 62 F.2d 261, 271 (8th Cir.) (selection of

[3]Appellant represented himself at his trial. He did so against the advice of his defense attorney. The defense attorney conducted the voir dire proceedings and assisted appellant throughout the rest of the trial.

bystander jurors by "interested" marshal under repealed federal statute), *cert. denied,* 289 U.S. 733 (1933). This court has reviewed the sheriff's selection of prospective jurors in three recent cases, *Henson* v. *Wyrick,* 634 F.2d 1080, *Holt* v. *Wyrick,* 649 F.2d 543 (8th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982), and *Thompson* v. *White,* 661 F.2d 103 (8th Cir. 1981), *vacated and remanded,* 456 U.S. 941, *on remand,* 680 F.2d 1173 (1982) (per curiam), *cert. denied,* 103 S. Ct. 830 (1983).

In *Henson* v. *Wyrick* the record showed that the sheriff hand-picked his acquaintances to serve as bystander jurors.[4] 634 F.2d at 1081-82. The sheriff was not personally involved in the investigation of the crime at issue in the case, but the sheriff's subordinates were responsible for the investigation and the arrest of the defendant and testified at trial. *Id.* The court held that the sheriff's selection of his acquaintances as the bystander jurors in order to complete the jury panel violated the defendant's due process rights. *Id.* at 1084. The court stated that although neither the fact that some jurors were acquaintances of the sheriff nor the fact that the state court allowed the sheriff some discretion in the selection of bystander jurors would in itself invalidate the conviction, *id.*, there was a considerable, and unacceptable, risk that the sheriff would select

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[4]The sheriff in *Henson* v. *Wyrick,* 634 F.2d 1080, 1081 (8th Cir. 1980), *cert. denied,* 450 U.S. 958 (1982), testified that

> to select bystander jurors he would go through the phone book or a list prepared by his office and, knowing the people in the county, select "regular citizens [and] high standard people to be jurors." The sheriff admitted that he would sometimes select jurors without relying on the phone book by calling people he thought would be available. Other times the sheriff would select standby jurors from local banks or businesses. The sheriff generally knew all the people he called. He made a conscious effort to select "solid citizens" and persons whom jury service would not inconvenience, e.g., retired persons or, in the winter, farmers.

bystander jurors sympathetic to the prosecution. *Id.* at 1085. In addition there was the possibility that the jurors would associate the credibility of the sheriff with that of the deputy sheriff who was a prosecution witness. *Id.* The court recognized that defense counsel has the opportunity to show bias on voir dire and thus protect the defendant from the potentially prejudicial bystander jurors selected by the sheriff but rejected voir dire as an adequate remedy. *Id.* "The subtleties involved in identifying [prospective] jurors' sympathies and predicting their evaluation of deputies' prospective testimony are often too intangible to identify during voir dire." *Id.* Moreover, the availability of voir dire does not really address the defendant's complaint that the method used to select bystander jurors was itself fundamentally unfair. *Cf. Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942) (dangers in selection of prospective jurors). The court concluded that under the circumstances a showing of actual bias was not necessary and granted the defendant a new trial. 634 F.2d at 1085 & n.5, *citing Peters* v. *Kiff,* 407 U.S. 493, 502-04 (1972).[5]

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[5]Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

. . . .

It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid system, or how that jury would have decided the case. Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

Peters v. *Kiff,* 407 U.S. 493, 502-04 (1972) (citations and footnote omitted) (standing question).

The facts were slightly different in *Holt* v. *Wyrick*. In *Holt* the defendant's trial had been removed to the neighboring county on a change of venue. For that reason, the sheriff who selected the bystander jurors for the defendant's jury panel was not associated with the sheriff's office that conducted the investigation of the crime with which the defendant was charged. 649 F.2d at 546. The court held that " '[s]ince the sheriff and his deputies were not involved in [the investigation of] this case prior to trial, there was no question of the sheriff acting out of loyalty to deputies or on the basis of special knowledge of the facts of the case.' " *Id.*, *citing State* v. *Holt*, 592 S.W.2d 759, 768 (Mo. 1980). "Equally important" to the court was the fact that the defendant presented no evidence that the sheriff had selected only his acquaintances to serve as bystander jurors. 649 F.2d at 546.

In *Thompson* v. *White* the sheriff personally selected the entire jury panel pursuant to an order of the state trial court,[6] not just the bystander jurors. Although the sheriff did not investigate the crime, the sheriff knew that the defandant was charged with fatally shooting a local law enforcement officer. The court concluded that under these circumstances "[t]he sympathy that the sheriff would feel for a fellow officer and his family would provide 'great potential for the sheriff to hand-pick jurors sympathetic to the prosecution.' " 661 F.2d at 107, *citing Henson* v. *Wyrick*, 634 F.2d at 1084. The court concluded that the case was much closer to *Henson* than to *Holt* and vacated the defendant's conviction.

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[6]The defendant was first tried in state court in 1961, but that conviction was reversed and the case remanded for a new trial following post-conviction relief motions. The defendant was again tried and convicted in 1966. The defendant challenged the jury selection in his 1966 trial in his petition for writ of habeas corpus in federal district court.

The present case is a close one on the facts. The sheriff was not personally involved in either the criminal investigation or, unlike *Henson*, the actual selection of the bystander jurors. However, unlike *Holt*, the criminal investigation and the actual selection of the bystander jurors were handled by the same sheriff's employees under his supervision. Under these circumstances we think the present case is much closer to *Henson*.

The central concern in the *Henson* case was the fundamental unfairness of an interested official's selecting the bystander jurors. 634 F.2d at 1082, *citing Cravens* v. *United States*, 62 F.2d at 271. The *Henson* court characterized the sheriff as an interested official because of the sheriff's institutional role and professional involvement in law enforcement, not because of any personal motives. 634 F.2d at 1084; *see State* v. *Alexander*, 620 S.W.2d at 386 (Bardgett, J., concurring) ("The sheriff is the chief law enforcement official in the county and in my opinion can never be regarded as totally unbiased regarding a criminal prosecution, regardless of what agency did the investigation. Sheriffs want prosecutions to be successful . . . ."). Where the underlying crime involves a law enforcement officer, as in *Thompson*, the sheriff's institutional interest in the prosecution and conviction of the defendant is exacerbated. Where the investigation did not involve a fellow law enforcement officer and was conducted by a different law enforcement agency, as in *Holt*, the sheriff's institutional interest is arguably attenuated. 649 F.2d at 546.

We are not persuaded that the sheriff has significantly reduced his institutional interest by delegating the actual selection of the bystander jurors to his subordinates. The sheriff is their immediate superior and can veto any of their selections. Moreover, the deputies are employees of the sheriff's department and thus share the sheriff's institu-

tional and professional interest in successful prosecutions. One of the city marshals was not an employee of the sheriff's department but has a similar institutional interest in law enforcement. The fact that the sheriff may have limited the exercise of discretion by the selecting officials by specifying neutral and objective selection criteria, such as residency and availability, does not address the constitutional defect at issue: the selection of bystander jurors by an interested official or his or her subordinates or professional associates. It is the participation of an interested official in the juror selection process that is fundamentally unfair. As noted in *Henson*, neither the exercise of some discretion nor the fact that some bystander jurors, or even all the bystander jurors, are acquainted with the sheriff will invalidate the conviction. 634 F.2d at 1084. We are concerned with the integrity and fairness of the method[7] used to select the bystander jurors.

We are aware that the pressure of time and the small population in rural areas may make the selection of bystander jurors by the sheriff the more expedient method. However, we believe that fundamental fairness requires a different method of bystander juror selection. The *Henson* court suggested random selection from a master jury list or the appointment of a special bailiff. *Id.* at 1085. There was some indication during oral argument that the problem of the selection of bystander jurors has been circumvented by the summoning of more prospective jurors, thus reducing the likelihood that bystander jurors would be required in any particular case.

Accordingly, the judgment of the district court is re-

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[7]Our holding that the *method* of bystander juror selection used in the present case is fundamentally unfair does not represent any negative evaluation of the sheriff's conduct or that of his deputies in selecting the bystander jurors.

versed. The district court is directed to grant the writ of habeas corpus and vacate the conviction. The state authorities should be directed to release appellant unless appellant is granted a new trial within a reasonable period of time as determined by the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON, *Petitioner,* v. GERARD FREY, Superintendent, Missouri Eastern Correctional Center, *Respondent.*	No. 81-1187 C (2)

ORDER

Upon consideration of the record, the Magistrate's report and recommendation, and petitioner's objections thereto,

IT IS HEREBY ORDERED that the report and recommendation of the Honorable David D. Noce, United States Magistrate, be and is accepted.

IT IS FURTHER ORDERED that petitioner's petition for a writ of habeas corpus be and is denied and that this case be and is dismissed.

John P. Nagle
UNITED STATES DISTRICT JUDGE

Dated: September 3, 1982

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VICTOR PAUL ANDERSON, *Petitioner,* v. GERALD FREY, Superintendent, Missouri Eastern Correctional Center, *Respondent.*	No. 81-1187 C(2)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Victor Paul Anderson for a writ of habeas corpus under 28 U.S.C. §2254 was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

Petitioner Anderson's original petition presented four separate grounds for habeas relief. The undersigned, in the original report and recommendation in this action, determined that petitioner had exhausted available state court remedies as required by §2254(b) and (c) on only one ground: The jury was unconstitutionally selected and empaneled by New Madrid County Sheriff Walter Ivy who was an "interested" party. Subsequently, petitioner chose to delete the three unexhausted grounds and proceed on the one exhausted ground as required by the recent Supreme Court decision, *Rose* v. *Lundy*, ____ U.S. ____, 102 S.Ct.

1198 (1982). An evidentiary hearing was held in this action on April 21, 1982 in Cape Girardeau, Missouri. Petitioner was not present, but was represented by counsel. Petitioner's counsel presented testimony from Ivy, James Pickard, Deputy Sheriff of New Madrid County, and Louis Alfred Scott, City Marshal of Risco, Missouri.

FINDINGS OF FACT

1. Walter Ivy has been Sheriff of New Madrid County, Missouri, since 1976. (Tr. 4). New Madrid County has 14,000 registered voters and Ivy would recognize 65-70% of those persons. (*Id.*, 26). Ivy has been a resident of the county since 1940, and has been involved in county law enforcement since 1960. (*Id.*, 30-31).

2. The Sheriff's department employs four full-time deputies, and also employs some city marshals throughout the county as part-time deputies. (*Id.*, 4.) The Sheriff's duties include subpoenaing jurors and witnesses acting as bailiff during criminal trials, and delivering civil summons. (*Id.*, 4.)

3. Ivy also has the special duty of procuring jurors for special panels for criminal trials. (*Id.*, 5.) This process of securing such jurors begins when he receives a special venire facias order from the circuit court to empanel a certain number of jurors. (*Id.*) The Sheriff's normal policy as of October 1980 was to utilize an informal selection process designed to produce a mixed panel, one containing blacks and women as well as persons residing throughout the entire county. The other selection criteria are that the jurors must be: (a) county residents (*id.*, 8); (b) available, for jury duty (*id.*, 31); (c) not prejudiced (*id.*, 15); and (d) "upstanding" citizens (*id.* 25). The two most significant criteria were residency and availability. (*Id.*, 31.) The Sheriff would contact certain of the deputies or city mar-

shals by radio and direct each to select a certain number of persons (sometimes directing the person to select a number of blacks or women) leaving it to the deputy sheriff or city marshal to select the specific persons. The deputies determine whether a potential juror is a county resident based upon their personal knowledge of the individual. (*Id.*, 8.) Sheriff Ivy gives his deputies no specific instructions as to the method of selection but once they have obtained people who satisfy the above criteria, they are to call Sheriff Ivy and provide him with the names. (*Id.*, 13.) The Sheriff might veto a particular juror selected by his deputies, if he believed the individual is a close personal friend of his, or was unqualified for some other good reason. (*Id.*, 32-33.) The deputies would not tell prospective jurors the name of the defendant in the particular case, but normally they would be aware themselves who the defendant was. (*Id.*, 9.)

4. The New Madrid County Sheriff's Department arrested petitioner and investigated the attempted robbery charge for which he was eventually convicted. The investigation was conducted by Deputy Sheriff Ronnie Patterson and Sheriff Ivy was not involved, except as Patterson's supervisor. (*Id.*, 22-23.) Sheriff Ivy served as bailiff at petitioner's trial, which involved opening and closing court and overseeing the jurors. (*Id.*, 21-22.) Ivy was initially listed as a witness for the state, but did not testify. Deputy Patterson testified at trial on behalf of petitioner. (Resp. Exh. A, 65-71.)

5. At petitioner's trial held in October 1980, twenty-six veniremen were summoned from a list drawn up by the New Madrid County Board of Jury Commissioners (Resp.Exh. A, 21). Of those, four were absent and four were stricken for cause. (Resp.Exh. E.) Consequently, the Circuit Court prepared two special venires and delivered them to Sheriff Ivy on October 27 and 28, 1980. (Resp.Exh. F and G.) These venires directed Sheriff Ivy to summon a

total of thirteen additional persons to complete the jury panel. These venires did not show the style of the case, only the case number, but Sheriff Ivy knew who the defendant was. (*Id.*, 10-11.)

6. To execute the venires Ivy contacted five of his deputies to secure jurors. He also contacted Louis Scott, who is not one of his deputies, but who serves as City Marshal of Risco, Missouri, in New Madrid County. (*Id.*, 31.) Ed Martin, a part-time deputy and the Marshal of Lilbourn, Missouri, secured three jurors: Howard Tillman, a white male from Conran, Missouri, Owen Riley, a white male from Lilbourn, Missouri, and Sam Riley, a black male from Lilbourn. (*Id.*, 20-21; 26-29.) Joe Moore, a part-time deputy and the Marshal of Portageville, Missouri, also secured three jurors: George Young, a black male, Ed Moody, a white male, and Abbie Coffee, a black female. (*Id.*, 19-20; 27-29.) All three of these individuals were from Portageville. Part-time Deputy Bud Ross, who is also the Marshal of Morehouse, Missouri, secured two individuals, Bonita J. Schuchart and Johnny Ward. (*Id.*, 28.) Robert Young, a full-time deputy and a resident of Howardville, selected one individual, M.B. Young, a black male from Howardville. (*Id.*, 28.) James Pickard, a full-time deputy residing in Gideon selected two individuals: Donna Nettles and Cleo Patillo, both of Gideon. (*Id.*, 16-17.) Louis Alfred Scott, the city marshal in Risco, Missouri, who is not an employee of the Sheriff's department, selected two individuals: Raymond Mays, and Virgil Penrod, both of Risco. (*Id.*, 50-53.) Sheriff Ivy did not veto any of these selections. (*Id.*, 34.) Thus, of the thirteen persons selected for the jury pool by the Sheriff's deputies three were females. The record shows the race of only seven of the thirteen individuals; four of these individuals were black.

7. Sheriff Ivy had a very casual acquaintance with eight of the special jurors. He was only slightly better ac-

quainted with the other five: Tillman, Nettles, Mays, Moody, and Penrod. (*Id.*, 33.) He was not closely acquainted with any of the special jurors. (*Id.*)

8. James Pickard has been a deputy sheriff in New Madrid County since 1977 (*id.*, 37). He works out of the courthouse in Gideon, Missouri, a town of approximately 1,200 people. (*Id.*, 38.) When Pickard is asked to select special jurors, he normally selects persons whom he knows will not be too inconvenienced by serving on a jury, and who are county residents. (*Id.*, 39.) He normally informs his selections by telephoning them and asking them if they can serve on the jury. (*Id.*) Pickard was contacted by Sheriff Ivy and directed to obtain two jurors for petitioner's jury pool. He contacted Donna Nettles and Cleo Patillo by telephone and they agreed to serve as jurors. (*Id.*, 42-43.) Pickard is acquainted with almost everybody in the town of Gideon. (*Id.*, 44.)

9. Louis Alfred Scott is the City Marshal in Risco, Missouri, which is located seventeen miles from New Madrid. (*Id.*, 45.) He has served in that capacity for approximately fifteen years, and is not an employee of the Sheriff's department. When asked to pick bystander jurors he would normally pick individuals he knew to be "pretty good citizens." (*Id.*, 47.) Scott was asked to select two individuals for petitioner's trial. He located Virgil Penrod at a service station, and asked him to serve as a juror (*Id.*, 50-51). He drove to Raymond Mays' house in Risco and asked him to be a juror. (*Id.*, 52.) Scott never knew whether particular people would be available to serve as jurors until he asked them. (*Id.*, 48.)

10. Of the thirteen individuals summoned by the Sheriff's deputies, one was excused for cause, M. B. Young, and two were absent on the day of trial, George Young and Sam Riley. (Resp.Exh. E.) Consequently, of the twenty-

eight veniremen who appeared for trial, eighteen had been summoned by the Board of Jury Commissioners and ten had been summoned by the Sheriff pursuant to the venire facias orders. (Resp.Exh. A, 21-22; Resp.Exh. E.) Petitioner challenged for cause the ten special jurors who had been summoned pursuant to the special venires on the ground that these jurors "were not selected by the jury commissioners but were selected by the Sheriff." (Resp. Exh. A, 19-20.) This challenge was denied by the trial court. (*Id.*, 20.) Petitioner then moved to quash the jury panel on the ground that an insufficient number of veniremen had been summoned by the Board of Jury Commissioners. (*Id.*, 20-21.) This motion was also denied. Three of the ten persons summoned by the Sheriff eventually served on petitioner's jury: Nettles, Patillo, and Penrod. (*Id.*, 25-26; Resp.Exh. E.)

CONCLUSIONS OF LAW

The case which is determinative of petitioner's unconstitutional jury selection is *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980), *cert. denied*, 450 U.S. 958 (1981). Henson's conviction was reversed because of a defective selection process for bystander jurors under §494.250(2) RSMo. 1969.[1] The Butler County, Missouri, sheriff who

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[1]That statute provides, in pertinent part:

> In all cases where the Board of Jury Commissioners fails to select jurors and alternatives as required by law the Sheriff of the County shall summon petit jurors from the several townships in the County, according to their respective populations, is nearly as may be, not less than ten days before the first month of the term of the court for which the jurors are summoned; and the Sheriff when ordered by the Court demanding a jury shall summon petit jurors during the term from the bystanders after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record.

selected the jurors for Henson's trial admitted that he handpicked all the bystander jurors from among his acquaintances:

> In an evidentiary proceeding before the magistrate, the Sheriff testified that to select bystander jurors he would go through the phone book or a list prepared by his office and, knowing the people in the county, select "regular citizens [and] high standard people to be jurors. The Sheriff admitted that he would sometimes select jurors without relying on the phone book by calling people he thought would be available. Other times the Sheriff would select bystander jurors from local banks or businesses. The Sheriff generally knew all the people he called. He made a conscience effort to select "solid citizens" and persons whom jury service would not inconvenience, e.g., retired persons or, in the winter, farmers. The Sheriff's office deputy who aided in the selection of bystander jurors, stated: "We would serve no one that we didn't think would be reliable, dependable person to be a good juror."
>
> The Sheriff testified that he was not personally involved in the investigation of the crime for which Henson was convicted. The deputy sheriff who was primarily responsible for the investigation of the defendant's crime testified that he was not involved in selecting jurors or bystander jurors, serving subpoenaes on jurors, or compiling a list of bystander jurors. The Sheriff selected fourteen of his acquaintances to complete the venire panel for Henson's trial. Seven of the twelve petit jurors came from the Sheriff's handpicked list.

Id., at 1081. The Court concluded that the constitutional defect in Henson's jury was that the Sheriff had handpicked his acquaintances to complete the venire panel. *Id.,*

1084. It was further noted that although a trial court could allow some discretion in the selection of jurors, the Sheriff could not exercise his discretion to insure that only his acquaintances would fill venire panel vacancies. *Id.* In reaching its final conclusion the Court in *Henson* quoted the United States Supreme Court's description of the potential dangers of a discretionary juror selection process such as that allowed by §494.250(2):

> and, its [the duty of selecting jurors] exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors *may exercise some discretion* to the end that competent jurors may be called. *But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.* (Emphasis added.)

Id., at 1043, quoting *Glasser* v. *United States,* 315 U.S. 60, 85-86 (1942). Most recently the Supreme Court has affirmed that its primary concern is that jury selection processes will produce jury pools which reflect a fair cross-section of the community. *See Duren* v. *Missouri,* 439 U.S. 357, 358-59 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975).

The instant case is distinguishable from Henson, and the process employed to select petitioner Thompson's venire jury panel was not constitutionally offensive.

First, Sheriff Ivy actually played a very passive role in the selection process. Rather than doing any of the selection himself he delegated it *entirely* to his deputies and to one city marshal. It is clear that the Sheriff's deputies handpicked the bystander jurors from among their ac-

quaintances, but this was done as an expeditious method to facilitate the two primary criteria for bystander jurors: (1) residency, and (2) availability.[2] As the testimony at the evidentiary hearing indicated, because of the small size of New Madrid County, even a totally random selection process would have likely resulted in a jury panel comprised almost entirely of acquaintances of the Sheriff and his various deputies.

Another factor distinguishing this case from *Henson* is that Sheriff Ivy placed some limitations on the discretion of his subordinates in selecting bystander jurors. Sheriff Ivy's selection procedure was calculated to obtain citizens constituting a geographical, racial, and gender-based cross-section of New Madrid County. He gave specific instructions to various deputies to select only persons of a particular race or sex. In fact, of the thirteen bystanders chosen by the Sheriff's department, four were black and three were female. Moreover, the selection process was delegated among six individuals covering different portions of the county to insure a geographical cross-section of New Madrid County residents.

Finally, unlike the circumstances in *Henson*, no one from the Sheriff's department testified for the prosecution at petitioner Anderson's trial. In fact, Ronnie Patterson, the deputy who investigated the crime, testified for the defense. (Resp.Exh. A, 65-71.) Consequently, the potential for the jury to associate the credibility of the Sheriff's De-

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[2]As noted at the evidentiary hearing, the methods employed to select the special jurors varied from deputy to deputy. Deputy Pickard indicated that he specifically sought persons who he was acquainted with, persons he knew to be county residents and whom "it [jury duty] wouldn't inconvenience too much." Risco City Marshal Louis Scott, on the other hand, indicated he employed a much more random procedure. (Tr. 48-51.)

partment with a prosecution witness was not a factor in the instant case.

It is the conclusion of the undersigned that the selection process employed in this case was not tainted by the same flaws found in *Henson*. Although Sheriff Ivy clearly employed some discretion in selecting jurors to complete the panel, he did not utilize his discretion to insure that all the bystander jurors were selected from among his own acquaintances. Furthermore, the process utilized was calculated to obtain a group representative of the community and constituting a fair cross-section of that community. Under these circumstances, it cannot be said that petitioner's Sixth and Fourteenth Amendment rights have been violated. Consequently, petitioner's claim of unconstitutional jury selection is without merit.

RECOMMENDATION

For the reasons set out above, it is the recommendation of the undersigned United States Magistrate that the petition of Victor Paul Anderson for a federal writ of habeas corpus be dismissed. The parties are advised that they have ten days within which to file written objections to this Report and Recommendation.

Respectfully submitted,

David D. Noce
UNITED STATES MAGISTRATE

Dated this 9th day of August, 1982.